APPELLANT PRO SE:

ALAN JEROME HUGHES
Michigan City, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ALAN JEROME HUGHES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0609-PC-824
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0303-PC-34280

December 11, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Alan Hughes appeals the denial of his petition for post-conviction relief ("PCR petition"), which challenged his convictions and sentence for Class B felony robbery and Class A misdemeanor resisting law enforcement, as well as the finding that he is an habitual offender. We affirm.

Issues

The issues properly before us are:

I. whether Hughes should have been permitted to raise a Blakely challenge to his sentence in a post-conviction proceeding;

II. whether he received effective assistance of trial counsel; and

III. whether he received effective assistance of appellate counsel.

Facts

We described the facts of this case as follows in Hughes' direct appeal:

> The facts favorable to the judgment are that on March 3, 2002, Ira Staten operated a cash register in the cafeteria at Methodist Hospital in Indianapolis, Indiana. Hughes poured a cup of coffee and went to Staten's register to pay for it. Once there, he threw the cup and its contents at Staten, striking her in the face and chest. He then picked up the cash register, ripped off the wires connecting it to the counter, and ran off with it. Anthony Powell, a custodian, chased after Staten, but stopped when Staten turned, faced Powell, and informed him that he (Hughes) had a gun and would shoot if Powell continued the pursuit. When Hughes exited the hospital, he entered the passenger side of a waiting car. At that point, a Methodist Hospital security guard confronted Hughes and the female driver and told them to get out of the vehicle. The woman complied, but Hughes slid into the

> driver's seat and drove off. A police chase ensued, after which Hughes was apprehended with the cash register still in his vehicle.

Hughes v. State, No. 49A05-0311-CR-602, slip op. p. 2 (Ind. Ct. App. Aug. 5, 2004).

The State charged Hughes with Class B felony robbery and Class A misdemeanor resisting law enforcement. It also alleged that Hughes was an habitual offender. Hughes originally was appointed counsel to represent him, but he later successfully moved to represent himself at trial, with appointed counsel as standby counsel.

On October 6, 2003, Hughes was tried by a jury and found guilty as charged. He also was found to be an habitual offender. The trial court imposed a sentence of twenty years for the robbery conviction and one year for the resisting conviction, to be served concurrently. It also enhanced the sentence by twenty years because of the habitual offender finding.

Hughes chose to have a court-appointed attorney represent him on appeal. On April 20, 2004, the attorney filed a brief with the sole issue being whether the trial court improperly denied Hughes' motion to continue on the morning of trial. We rejected this argument and affirmed Hughes' convictions on August 5, 2004. Hughes filed neither a petition for rehearing nor a petition to transfer.

On July 25, 2005, Hughes filed a pro se PCR petition. It alleged that the trial court had sentenced him in violation of Blakely v. Washington, which the United States Supreme Court had decided on June 24, 2004. It also alleged that he received ineffective assistance of both trial and appellate counsel. On August 7, 2006, the post-conviction court denied Hughes' petition. He now appeals.

Analysis

Post-conviction proceedings provide defendants the opportunity to raise issues not known or available at the time of the original trial or direct appeal. Stephenson v. State, 864 N.E.2d 1022, 1028 (Ind. 2007). If an issue was known and available but not raised on direct appeal, the issue is procedurally foreclosed. Id. "If an issue was raised and decided on direct appeal, it is res judicata." Id. "In post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal." Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002).

"In post-conviction proceedings, the defendant bears the burden of proof by a preponderance of the evidence." Stephenson, 864 N.E.2d at 1028. We review factual findings of a post-conviction court under a "clearly erroneous" standard but do not defer to any legal conclusions. Id. We will not reweigh the evidence or judge the credibility of the witnesses and will examine only the probative evidence and reasonable inferences therefrom that support the decision of the post-conviction court. Id.

I. Blakely Claim

Hughes first makes a freestanding claim that he was sentenced in violation of the Supreme Court's holding in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). As applied to Indiana's presumptive sentencing scheme under which Hughes was sentenced, Blakely prohibited the reliance on facts not found by a jury or admitted by the defendant to enhance a sentence above the presumptive, with the exception of criminal history. See Gutermuth v. State, 868 N.E.2d 427, 431 (Ind. 2007) (citing Smylie

v. State, 823 N.E.2d 679 (Ind. 2005), cert. denied). Hughes asserts the trial court improperly relied on facts neither found by a jury or admitted by him in order to enhance his sentence to twenty years, or ten years above the then-presumptive for a Class B felony.

The relevant timeline of this case is that Hughes was sentenced on November 5, 2003; his appellate attorney filed a brief on April 20, 2004; Blakely was decided on June 24, 2004; and we issued our opinion on August 5, 2004. In the original brief, Hughes did not challenge his sentence at all, nor was there any attempt to raise a sentencing issue after Blakely was decided, either by submitting an amended brief or by filing a petition for rehearing or transfer. Our supreme court in Smylie said:

> [I]t does not ask too much that a criminal defendant have contested his or her sentence on appeal, even if the Blakely element of that contest is added later, as it has been by Smylie. Thus, we regard defendants such as Smylie who sought sentence relief from the Court of Appeals based on arbitrariness or unreasonableness . . ., and who added a Blakely claim by amendment or on petition to transfer as having adequately presented the issue of the constitutionality of their sentence under Blakely.
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> Defendants who have appealed without raising any complaint at all about the propriety of their sentence have arguably made the sort of knowing and intelligent decision regarding their appeal that is required for waiver to exist. Thus, those defendants who have not raised objections to their sentences should be deemed to have at least forfeited, and likely waived, the issue for review.
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> . . . . [T]hose defendants who did not appeal their sentence at all will have forfeited any Blakely claim.

Smylie, 823 N.E.2d at 691.

We applied this language from Smylie in a post-conviction case that is similar to Hughes' case, Henry v. State, 848 N.E.2d 1124 (Ind. Ct. App. 2006). The defendant in Henry was sentenced and initiated his appeal before Blakely was decided, and we handed down our decision affirming the defendant's sentence after Blakely was decided. The defendant had challenged the appropriateness of his sentence and whether the trial court had abused its discretion in sentencing him, but he never attempted to make a Blakely claim after that case was decided. In a post-conviction proceeding, the defendant tried to make a Blakely argument. We rejected this attempt, concluding that the failure to raise a Blakely argument during the course of the direct appeal, by way of submitting an amended brief or raising the issue in a petition for rehearing or to transfer, resulted in forfeiture of the argument. Henry, 848 N.E.2d at 1126-27.

Here, Hughes never sought at all to challenge his sentence during his direct appeal. Thus, the waiver/forfeiture language of Smylie applies with even more force than it did in Henry. Additionally, as a general rule defendants must challenge their sentence, if at all, on direct appeal and not in a post-conviction proceeding. See Collins v. State, 817 N.E.2d 230, 233 (Ind. 2004). Having never sought to challenge his sentence during his direct appeal, either through Blakely or otherwise, Hughes is precluded from doing so now. Whether this failure constituted ineffective assistance of appellate counsel is an argument we address later in this opinion.

II. Ineffective Assistance of Trial Counsel

Claims of ineffective assistance of counsel are reviewed under the two-part test announced in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). Grinstead

v. State, 845 N.E.2d 1027, 1031 (Ind. 2006). A defendant must demonstrate both that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Id. Prejudice occurs when the defendant demonstrates that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. (quoting Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). A reasonable probability arises if confidence in the outcome of the trial is undermined. Id.

"We presume that counsel provided adequate assistance and defer to counsel's strategic and tactical decisions." Terry v. State, 857 N.E.2d 396, 403 (Ind. Ct. App. 2006), trans. denied. Whether a lawyer performed reasonably under the circumstances is determined by examining the whole of the lawyer's work on a case. Oliver v. State, 843 N.E.2d 581, 591 (Ind. Ct. App. 2006), trans. denied. "A defendant must offer strong and convincing evidence to overcome the presumption that counsel prepared and executed an effective defense." Id. "The purpose of an ineffective assistance of counsel claim is not to critique counsel's performance, and isolated omissions or errors and bad tactics do not necessarily mean that representation was ineffective." Grinstead, 845 N.E.2d at 1036.

On September 5, 2003, approximately one month before trial, the trial court granted Hughes permission to proceed pro se. His appointed attorney was retained as standby counsel. Ordinarily, a defendant who elects to proceed pro se with the assistance of standby counsel cannot subsequently claim that counsel was ineffective. See Carter v. State, 512 N.E.2d 158, 163-64 (Ind. 1987).

Nonetheless, Hughes seems to argue that he was prejudiced by counsel's ineffective performance in his pretrial investigation of the case, and such performance essentially forced Hughes to proceed pro se. Much of the dispute focuses upon a second video recording of the incident that trial counsel allegedly failed to investigate, which purportedly would have supported Hughes' version of the incident that that the spilling of the coffee was accidental, and Hughes' taking of the cash register and running out of the hospital with it was a panicked reaction to that accident.

Before Hughes was granted permission to proceed pro se, trial counsel had moved for a psychiatric evaluation of Hughes to determine either whether he was legally insane at the time of the crime or was incompetent to stand trial. Two experts opined that Hughes was sane and competent to stand trial. Counsel also conducted two depositions of witnesses and had viewed the first video recording showing Hughes taking the cash register. Counsel also discussed the case with Hughes five or six times, but testified at the PCR hearing that "we [were] not able to come up with any other alternative theories of other witnesses that could help." PCR Tr. p. 42. Counsel also recalled,

> It appeared we didn't have any witnesses that were favorable to us and my assessment of the case was not very good. And that's why—what you had indicated to me was that you felt you'd be better off to defend yourself because my assessment—you didn't like my assessment of the case.

Id. at 41.

Counsel's testimony and the work he did on the case before Hughes sought to proceed pro se supports the conclusion that counsel's performance was reasonable. Hughes has failed to persuade us that he received ineffective assistance of counsel, or that

counsel's pretrial performance forced him to proceed pro se. Instead, that decision was prompted by Hughes' refusal to accept counsel's professional and reasonable assessment of the merits of his case.

III. Ineffective Assistance of Appellate Counsel

Hughes' final argument that we address in detail is whether he received ineffective assistance of appellate counsel. As with claims of ineffectiveness of trial counsel, a defendant claiming ineffective assistance of appellate counsel must show that counsel was deficient in his or her performance and that the deficiency resulted in prejudice. Hopkins v. State, 841 N.E.2d 608, 611 (Ind. Ct. App. 2006) (quoting Fisher v. State, 810 N.E.2d 674, 676-77 (Ind. 2004)). Ineffective assistance of appellate counsel claims generally fall into three basic categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. Id.

It would appear that part of Hughes' argument regarding appellate counsel is that she should have challenged the validity of his sentence under Blakely. We note that in support of this claim during the PCR hearing, Hughes submitted a letter he purportedly sent to his attorney on April 10, 2004, in which he wrote, "There are several issues I would like to discuss with you, however the one I feel is of importance the most is how I was sentenced outside the guidelines of blakely." PCR Ex. 5. We say "purportedly," because Blakely was not decided until June 24, 2004. It is obvious this letter is an after-the-fact fabrication.

Aside from this letter, Hughes cannot establish that appellate counsel was ineffective for not submitting an amended brief following Blakley, or for not seeking

rehearing or transfer on a Blakely argument after we handed down our opinion on August 5, 2004. Appellate counsel cannot be held ineffective for failing to anticipate or effectuate a change in the existing law. Concepcion v. State, 796 N.E.2d 1256, 1260 (Ind. Ct. App. 2003), trans. denied. When Blakely was first decided, its impact on Indiana, which did not have a strict guideline system as was in place in Washington state, was not immediately apparent. The attorney general of Indiana took the position early on that Blakely had no impact on Indiana's presumptive sentencing scheme. See Muncy v. State, 834 N.E.2d 215, 219 (Barnes, J., concurring in result) (citing National Center for State Courts, Blakely v. Washington: Implications for State Courts, p. 10 (July 16, 2004)). The earliest decision from this court definitively holding that Blakely applied in Indiana came on October 20, 2004. See Krebs v. State, 816 N.E.2d 469, 475 (Ind. Ct. App. 2004). This was more than six weeks after September 5, 2004, or when a rehearing or transfer petition on Hughes' case would have been due. Our supreme court would not decide Smylie until March 9, 2005. The fact that some defense attorneys decided to challenge Indiana's sentencing scheme under Blakely while Hughes' attorney did not does not render counsel's performance unreasonable or deficient, based on the state of law at the time. See Concepcion, 796 N.E.2d at 1262-63 (holding appellate counsel was not ineffective for not anticipating or effectuating a change in the law that occurred very shortly after the defendant's direct appeal).

We also note that one of the very earliest cases from this court to even mention Blakely, and which was decided before Hughes' deadline for a rehearing or transfer petition, pointed out that criminal history is an exception to the Blakely rule. See Carson

v. State, 813 N.E.2d 1187, 1189 (Ind. Ct. App. 2004).[1] Hughes has eight felony convictions on his record, aside from the two used to support the habitual offender finding, which alone might be deemed sufficient to support his maximum twenty-year sentence. Certainly, given the unclear state of the law at the time of Hughes' direct appeal and his extensive criminal history, appellate counsel did not perform below an objective level of reasonableness in not trying to add a Blakely claim after that case was decided.

Hughes also takes issue with his appellate attorney's interpretation in her brief of what Hughes' trial defense was, namely that the coffee was accidentally spilled, and Hughes did not intend to harm the cashier. We observe that Hughes' trial attorney also related at the PCR hearing that his version of the incident was as follows:

> Basically your side of the story was that you're in the cafeteria and this lady bumped you or you accidentally splashed hot coffee on her and that when she—somehow she reacted and you panicked and in your panic your grabbed the cash box, ripped the wire loose and ran out of the hospital with it.

PCR Tr. p. 29. Hughes did not deny that this was his version of the incident, and in fact asked his trial attorney, "So my point, after I explained all that to you you never had—did you have an investigator or anything to go out to substantiate my story?" Id. Given this, we are at a loss as to how appellate counsel's description of Hughes' version of the incident was materially inaccurate.

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[1] Unlike Krebs, Carson did not definitively address whether Blakely applied in Indiana.

We still have difficulty, as we did on direct appeal, attempting to discern what Hughes' defense to the robbery was or is. He never has denied actually taking the cash register. Sometime during the robbery process, hot coffee was spilled on the cashier and the cashier suffered bodily injury. As we said on direct appeal, Hughes "was responsible for any injury that was a natural and probable consequence of the events and circumstances surrounding the robbery or attempt."[2] Hughes, slip op. at 5 (citing Outlaw v. State, 484 N.E.2d 10 (Ind. 1985)). In sum, Hughes has failed to establish that he received ineffective assistance of appellate counsel.[3]

Conclusion

Hughes may not challenge his sentence on Blakely grounds in a PCR proceeding. He also has failed to establish that he received ineffective assistance of either trial or appellate counsel. We affirm the denial of post-conviction relief.

Affirmed.

KIRSCH, J., and ROBB, J., concur.

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[2] There is a typo in the direct appeal opinion, as we said "Staten [the cashier] was responsible for any injury . . . ." Hughes, slip op. at 5 (emphasis added). Clearly, we meant to say Hughes was responsible.

[3] Hughes raised two other issues in his brief. First, he contended the trial court erred in the manner in which it pronounced his habitual offender sentence enhancement. Such a freestanding issue cannot be addressed in a PCR proceeding. See Sanders, 765 N.E.2d at 592. Second, he again challenges the denial of his continuance motion. That issue was decided adversely to Hughes on direct appeal, and res judicata prevents him from raising it again. See Reed v. State, 856 N.E.2d 1189, 1194 (Ind. 2006).